

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of Applications of)	
)	
MONROE COUNTY, NEW YORK)	File Nos. 0001561608, 0001652297
)	
To Operate a Public Safety Talkback)	
Paging System on Frequency)	
901.375 MHz in Monroe County, New York)	

ORDER

Adopted: July 1, 2004

Released: July 7, 2004

By the Chief, Public Safety and Critical Infrastructure Division, Wireless Telecommunications Bureau:

I. INTRODUCTION

1. We have before us an application¹ and waiver request² filed by the Monroe County, New York (Monroe or the County) for authority to operate a public safety talkback paging system on a countywide basis on a frequency designated for non-public safety use. In addition, we have an application for special temporary authority (STA) to permit the requested use of a system with the same parameters, under the same waiver request, while the first application is pending.³ Pursuant to Section 337(c) of the Communications Act, as amended (the Act)⁴ or, alternatively, Section 1.925 of the Commission's Rules,⁵ Monroe seeks a waiver of the Commission's Rules to permit it to use frequency 901.375 MHz.⁶ As set forth below, we find that the requested frequency is currently assigned. Consequently, we deny the waiver request and dismiss the applications.

II. BACKGROUND

2. Monroe County, New York, which includes the City of Rochester, has a population of approximately 715,000 and covers an area of approximately 663 square miles.⁷ In 2002, the Public Safety and Private Wireless Division⁸ granted Monroe a waiver to permit it to operate a public safety one-

¹ See FCC File No. 0001561608 (filed Dec. 30, 2003).

² See Request for Waiver of Monroe County, New York (filed Dec. 30, 2003) (Request).

³ See FCC File No. 0001652297 (filed Mar. 11, 2004).

⁴ 47 U.S.C. § 337(c).

⁵ 47 C.F.R. § 1.925.

⁶ See Request at 1. Monroe states that it could also utilize any other frequency between 901.350 MHz and 901.400 MHz if the requested frequency is unavailable. *Id.* at 6.

⁷ *Id.* at 1.

⁸ The Commission reorganized the Wireless Telecommunications Bureau effective November 13, 2003, and the relevant duties of the Public Safety and Private Wireless Division were assumed by the Public Safety and Critical (continued....)

way paging system on frequency 931.3125 MHz (a Part 22 paging frequency), in order to supplement its thirty-year-old UHF one-way paging system, which had become antiquated and inadequate.⁹ Monroe now seeks a waiver in order to permit it to utilize frequency 901.375 MHz as a talkback channel for two-way paging.¹⁰

III. DISCUSSION

3. *Section 337.* Section 337(c) of the Act provides that the Commission must waive any rules necessary to authorize entities providing public safety services to operate on “unassigned frequencies,” if the Commission makes five specific findings:

- public safety spectrum is not immediately available;
- the proposed use will not cause harmful interference to protected spectrum users;
- public safety use of the unassigned frequencies is consistent with public safety spectrum allocations in the geographic area;
- the unassigned frequencies have been allocated for non-public safety use for more than two years; and
- grant of the application is consistent with the public interest.¹¹

4. When considering requests under Section 337, we first must determine whether the applicant is “an entity seeking to provide public safety services.”¹² Based on the record before us and our previous Monroe County *MO&O*, we find that Monroe is an entity providing public safety services.¹³ We therefore move to whether Monroe meets the other statutory requirements supporting a waiver under Section 337(c) of the Act.¹⁴

(Continued from previous page) _____

Infrastructure Division. *See* Reorganization of the Wireless Telecommunications Bureau, *Order*, 18 FCC Rcd 25414, 25414 ¶ 2 (2003).

⁹ *See* Monroe County, New York, *Memorandum Opinion and Order*, 17FCC Rcd 21535 (WTB PSPWD 2002) (Monroe County *MO&O*). The UHF system operates under Call Signs WPIK755 and WPGQ974. The 900 MHz system operates under Call Sign WPWY916.

¹⁰ Request at 5, 9.

¹¹ *See* 47 U.S.C. § 337(c).

¹² 47 U.S.C. § 337(c). Section 337(f) defines the term “public safety services” as “services—
 (A) the sole or principal purpose of which is to protect the safety of life, health, or property;
 (B) that are provided—
 (i) by State or local government entities; or
 (ii) by non-governmental organizations that are authorized by a governmental entity whose primary mission is the provision of such services; and
 (C) that are not made commercially available to the public by the provider.”

47 U.S.C. § 337(f).

¹³ Request at 2. *See also* Monroe County *MO&O*, 17 FCC Rcd at 21538 ¶ 7.

¹⁴ April 2003 Amendment at 7.

5. Before addressing the five findings required for grant of a waiver under Section 337 of the Act, we note that Section 337(c)(1) requires that the requested non-public safety spectrum be unassigned.¹⁵ In making a determination of whether a frequency is “unassigned,” we use the technical rules that govern the spectrum requested.¹⁶ Frequency 901.375 MHz is contained within narrowband personal communications services (PCS) channel 26 (901.35 MHz-901.40 MHz).¹⁷ The narrowband PCS spectrum auction (Auction No. 41) closed on October 16, 2001.¹⁸ The high bidder for channel 26 in MTA035, Buffalo-Rochester, New York, which includes Monroe County,¹⁹ was Space Data Spectrum Holdings, LLC (SDSH).²⁰ SDSH was granted a license for channel 26 in MTA035 under Call Sign WPXJ247 on April 15, 2003. Monroe did not file its application until after Auction No. 41 was concluded and the license for SDSH was granted. Because frequency 901.375 MHz is within the channel 26 frequency band and Monroe County is located within MTA035, we conclude that Monroe is seeking a frequency that is currently assigned to SDSH. Because Monroe has failed to satisfy the prerequisite criterion that the spectrum be unassigned, we need not address its arguments regarding the five criteria under Section 337(c)(1) of the Act.²¹

6. *Section 1.925.* Next, we determine whether a waiver is warranted under Section 1.925 of the Commission’s Rules. Section 1.925(b)(3) of the Commission’s rules permits waiver of the Commission’s rules if a petitioner can satisfy either of the following conditions: (i) the underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or, (ii) in view of the unique or unusual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.²² Section 24.129 sets forth the frequencies available for narrowband PCS, including 901.35-901.40 MHz, which encompasses the requested frequency 901.375 MHz. Regarding the first prong of the waiver standard, we conclude that Monroe has failed to show that the underlying purpose of Section 24.129 would not be frustrated by grant of a waiver.

7. Indeed, based on the record before us, we believe that denial of Monroe’s request serves the underlying purpose. In this regard, we note that the underlying purpose of Section 24.129 is to foster the Commission’s goals of universality, speed of deployment, diversity of services and competitive delivery of narrowband PCS²³ while preventing harmful interference to licensed operations. Moreover, the

¹⁵ U.S.C. § 337(c)(1).

¹⁶ City of El Segundo, *Order*, DA 04-1036, ¶ 8 (WTB PSCID rel. Apr. 20, 2004) (*El Segundo*) (citing Syosset Fire District, *Memorandum Opinion and Order*, 18 FCC Rcd 16635, 16639 ¶ 8 (WTB PSPWD 2003)).

¹⁷ 47 C.F.R. § 24.129(c)(1).

¹⁸ See Narrowband PCS Spectrum Auction Closes, *Public Notice*, 16 FCC Rcd 18663, 18663 (WTB 2001) (*Auction Closes Public Notice*).

¹⁹ An MTA map is available on the internet at <http://wireless.fcc.gov/auctions/data/maps/mta.pdf>.

²⁰ *Auction Closes Public Notice*, 16 FCC Rcd at 18728.

²¹ *El Segundo*, DA 04-1036, ¶ 8 (citing State of Ohio, *Memorandum Opinion and Order*, 17 FCC Rcd 439, 447 ¶ 13 (WTB PSPWD 2002) (citing Hennepin County, *Order*, 14 FCC Rcd 19418 (WTB 1999); New Hampshire Department of Transportation, *Memorandum Opinion and Order*, 14 FCC Rcd 19438, 19442 (WTB 1999)), *recon. pending*).

²² 47 C.F.R. § 1.925.

²³ Amendment of the Commission’s Rules to Establish New Narrowband Personal Communications Services, *First Report and Order*, 8 FCC Rcd 7162, 7165 ¶ 19 (1993).

Commission acknowledged the need to designate sufficient channels to permit existing paging operators to upgrade their systems.²⁴

8. Regarding the second prong, we conclude that grant of the request would be inequitable and contrary to the public interest, particularly given the potential interference to an incumbent licensee.²⁵ We believe, based on the circumstances presented, that operation of Monroe's proposed system would cause interference to SDSH, which would in turn adversely affect those benefiting from SDSH's services. We find it significant that Monroe has not demonstrated otherwise.

IV. CONCLUSION

9. Based on the record of this proceeding, we find that Monroe's request fails the criteria set forth under Section 337(c) of the Act and Section 1.925 of the Commission's Rules to obtain a waiver and a grant of its application to operate a public safety communications system under the circumstances presented. We therefore deny the request for waiver, and dismiss the applications.

V. ORDERING CLAUSES

10. Accordingly, **IT IS ORDERED** that, pursuant to Sections 4(i) and 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337(c), and Sections 1.925 and 24.129 of the Commission's Rules, 47 C.F.R. §§ 1.925, 24.129, the request for waiver associated with the captioned applications filed by Monroe County on December 30, 2003, and March 11, 2004, to use frequency 901.375 MHz, for public safety services as requested in the captioned applications **IS DENIED**.

11. **IT IS FURTHER ORDERED** that, pursuant to Sections 4(i) and 337(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 337(c), and Section 1.934 of the Commission's Rules, 47 C.F.R. § 1.934, FCC File Nos. 0001561608 and 0001652297 **ARE DISMISSED**.

12. This action is taken under delegated authority pursuant to Sections 0.131 and 0.331 of the Commission's Rules, 47 C.F.R. §§ 0.131, 0.331.

FEDERAL COMMUNICATIONS COMMISSION

D'wana R. Terry
Chief, Public Safety and Critical Infrastructure Division
Wireless Telecommunications Bureau

²⁴ *Id.*, ¶ 20.

²⁵ In addition, Monroe has not demonstrated unique or unusual circumstances, as we have received similar requests from other public safety entities in the northeast. *See, e.g.,* State of Ohio, *Memorandum Opinion and Order*, 17 FCC Rcd 439 (WTB PSPWD 2002); Syosset Fire District, *Memorandum Opinion and Order*, 18 FCC Rcd 16635 (WTB PSPWD 2003).